No. 80-1413

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARION COUNTY SCHOOL DISTRICT; MARION COUNTY SCHOOL BOARD; SAM MANSFIELD, Chairman; LAMAR LUFFMAN, Vice Chairman; CAROL A. PARRISH, Member; J. L. COLLUM, Member; NATHAN GILMAN, Member; H. LEON ROGERS, Superintendent, Marion County School District, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITIONERS' REPLY BRIEF

NATHAN LEWIN
(Counsel of Record)
ANNE SHERE WALLWORK
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

JOHN P. McKEEVER
PATTILLO, MACKAY & McKEEVER, P.A.
Suite 500 Concord Square
Seven East Silver Spring Blvd.
Post Office Box 1450
Ocala, Florida 32670
(904) 732-2255

Attorneys for Petitioners

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PETITIONERS' REPLY BRIEF

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1. The Solicitor General's Brief in Opposition is, unfortunately, not candid with this Court. The government asserts that the decision of the court of appeals merely upholds a "well-settled right," and it disputes our characterization of the decision below as "unprecedented" and "novel" (Br. in Opp. 8, 10). The Department of Justice's own actions, however,

prove how path-breaking the Civil Rights Division considers this very case.

Since September 10, 1980, when the Court of Appeals approved the contract theory on which the government relies, the Department of Justice has filed three school desegregation lawsuits asserting this legal theory.[1] All these cases had been referred by HEW to the Department of Justice long before they were filed. Plainly, the decision on whether to institute a lawsuit in each instance was deliberately delayed until the court of appeals would decide the *Marion County* case.

We call to the Court's attention the dates on which each of the three recent cases was referred to the Department of Justice and on which each was filed. The Court will note that the case involving the Big Spring Independent School District of Texas was referred to the Department of Justice on June 8, 1978, but was not filed in federal court until September 18, 1980, more than a week after the *Marion County* decision. Similarly, the case involving the Marshall (Texas) Independent School District was referred on December 26, 1978, but was not filed in federal court until December 2, 1980. And the case involving the City of Chicago was referred by HEW on October 29, 1979, for "appropriate legal action to secure compliance by the Board of Education with Title VI and said Assurances" (*United States* v. *Board of Ed. of*

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[1] We are lodging copies of the three complaints, together with the complaint in the *Marion County* case, with this Court. In the Appendix to this Reply Brief, we reproduce the first paragraphs of each of these complaints, which explain their jurisdictional basis and describe the nature of the claim.

the City of Chicago, Complaint, ¶ 12). Yet the lawsuit was not filed until September 23, 1980—almost two weeks *after* the *Marion County* decision. If the legal principle entitling the United States to sue is so "well-settled," why were these lawsuits delayed until after the *Marion County* decision?

In answer to our Freedom of Information Action request (*see* Pet. 24, n. 14), the Department of Justice provided not a single complaint filed before September 10, 1980 (other than its *Marion County* test case) in which the jurisdictional allegation stated that the action was to enforce "the contractual assurances and undertakings" provided by a defendant school district pursuant to Title VI.[2] That jurisdictional language appears in Paragraph 1 of the *Marion County* complaint and in the first paragraph of each of the three cited lawsuits filed since September 10, 1980.

The conclusion is virtually inescapable that the Department of Justice was awaiting the court of appeals' decision in this case to see whether the appellate court would sustain its new theory—which renders nugatory all other federal laws authorizing public school deseg-

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[2] The government's brief cites only one district court case for this purportedly established proposition (*United States* v. *Tatum Indep. School District,* 306 F.Supp. 285 (E.D. Tex. 1969)) and dictum in the sixty-seventh footnote of one court of appeals ruling (*Brown* v. *Califano,* 627 F.2d 1221, 1232 n. 67 (D.C. Cir. 1980)). (*United States* v. *Frazier,* 279 F.Supp. 319 (M.D. Ala. 1968), did not involve enforcement of an Assurance of Compliance submitted by a public school. It involved a pledge of nondiscrimination in the recruitment, hiring, and promotion of State personnel administering federally funded public assistance programs.) Neither *Tatum* nor *Brown* analyzed the question whether an action on an assurance was permissible under Title VI in light of the specific provisions of Title IV.

regation litigation by the United States. Once the Fifth Circuit issued its decision on September 10, 1980, the other cases based on this theory could be initiated and pursued. If, on the other hand, the Fifth Circuit's ruling merely implemented a "well-settled right," there was no reason whatever to delay these suits.

2. It is obviously important that school district personnel throughout the United States, as well as federal courts across the land, know promptly whether the Justice Department's novel legal theory is valid. If it is, there will surely be a substantial increase in the volume of school desegregation lawsuits seeking transportation relief. A greater burden will be cast on the federal courts, and school personnel will have to budget costs and assign administrative personnel for anticipated busing litigation brought by the United States.

3. The Solicitor General's argument that lawsuits to enforce desegregation assurances filed under Title VI are merely enforcement of a "condition to [the] grants of federal assistance" (Br. in Opp. 10-11) overlooks the fact that the authority to secure such assurances began with Title VI of the Civil Rights Act of 1964. Thus, the government's reliance on Title XI of the 1964 Act, which preserves rights the United States had "under existing law to institute or intervene in any action or proceeding," (*see* Br. in Opp. 12) did not impliedly preserve any right to sue on an Assurance of Compliance. There was, in short, no right "under existing law" prior to the adoption of the 1964 Act to compel a School District to abide by a contractual obligation to desegregate.[3] Indeed, the Fifth

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[3] The intense legislative debates over the wisdom of Title IV make it clear that Congress first empowered the United States to bring any form of desegregation action with the passage of Title

Circuit's ruling in *United States* v. *Madison County Board of Education*, 326 F.2d 237 (5th Cir.), *cert. denied*, 379 U.S. 929 (1964), conclusively establishes that no such contractual right existed before the enactment of the Civil Rights Act of 1964.[4]

And it would have made no sense whatever for Congress carefully to limit, in Title IV, the instances when the United States could sue a school district for desegregation if, by enacting Title VI, it was enabling the United States to bring a desegregation suit irrespective of any other conditions. Any language in the 1964 legislative history relating to judicial proceedings and to a preference for lawsuits over administrative fund terminations related to lawsuits *under Title IV*.[5]

IV of the Civil Rights Act of 1964. *See, e.g.*, 110 Cong. Rec. 1518, 1527 (remarks of Rep. Celler); *id.* 6815-18 (remarks of Sens. Douglas, Humphrey, and Stennis); *id.* 8614 (remarks of Sen. Sparkman).

[4] This fact also distinguishes *United States* v. *Stevenson*, 215 U.S. 190, 197 (1909), on which the Solicitor General relies (Br. in Opp. 10-11). *Stevenson* holds that statutes creating a right and providing a "special remedy for its enforcement," will not restrict "the government in the use of known rights and remedies" unless "the language . . . [is] clear and specific to that effect." Since the United States did not have a "known right" to bring any kind of desegregation suit, including an action for specific enforcement of a school district's assurance of nondiscrimination, before the 1964 Civil Rights Act became law, Congress did not have to bar the United States from suing public school districts for specific performance of Title IV assurances in order to establish that such an action could not be maintained.

[5] Senator Pastore, on whom the Solicitor General relies (Br. in Opp. 13), said (110 Cong. Rec. 7660 (1964); emphasis added):

> The way to avoid such a hardship [imposed by cutting off funds to public schools] will be for the Attorney General to institute a desegregation suit *under Title IV*, rather than to terminate the assistance.

No Senate sponsor contemplated that the United States would be able to bypass Title IV by claiming that a Title VI Assurance of Compliance was an open-ended contractual commitment enforceable by the United States.

4. The government's Brief in Opposition also misreads more recent legislative history—particularly the statements made by sponsors of anti-busing legislation. Senator Eagleton's statement quoted at page 15 of the Solicitor General's brief did not state or suggest that even while an Assurance of Compliance submitted to HEW could not be used to secure busing by administrative enforcement it could be read as a contract, enforceable in a suit by the Department of Justice, to bus for desegregation. Senator Eagleton said only that even with his proposed legislation HEW could ask the Department of Justice to institute litigation, and it is clear, we submit, that he was referring to litigation *under Title IV*, not to the purported action to enforce a contract, as is involved in this case.

5. There is, finally, no merit to the argument that "serious constitutional problems" would be raised if the Eagleton-Biden Amendment and its predecessors were understood to prevent busing lawsuits based on alleged violations of Assurances of Compliance submitted under Title VI. The Department of Justice remains free, if Title IV standards are satisfied, to initiate an action under those provisions of law. Moreover, legal claims made by private individuals are not affected in any way by the anti-busing amendments. Courts are free to grant remedies, where necessary and appropriate, at the instance of private parties. Barring the administrative remedy and any judicial

alternative which proceeds on the same assumption—*i.e.*, that the grant of federal funds entitles the federal government to demand the transportation of students—is not, in this light, remotely unconstitutional.

CONCLUSION

For the foregoing reasons as well as those stated in our Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
ANNE SHERE WALLWORK
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

JOHN P. MCKEEVER
PATTILLO, MACKAY & MCKEEVER, P.A.
Suite 500 Concord Square
Seven East Silver Spring Blvd.
Post Office Box 1450
Ocala, Florida 32670
(904) 732-2255

Attorneys for Petitioners

APPENDIX

APPENDIX

[Filed September 18, 1980]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
(ABILENE DIVISION)

Civil Action No. CA1-80-53

UNITED STATES OF AMERICA, *Plaintiff*,

v.

BIG SPRING INDEPENDENT SCHOOL DISTRICT; LYNN C. HISE, SUPERINTENDENT; BOARD OF TRUSTEES, BIG SPRING INDEPENDENT SCHOOL DISTRICT, MRS. CAROL HUNTER, BOARD MEMBER; MR. DELBERT DONELSON, BOARD MEMBER; MR. AL VALDES, BOARD MEMBER; MR. CHARLES BEIL, BOARD MEMBER; MR. BERT HARRIS, BOARD MEMBER; MR. JERRY FORESYTH, BOARD MEMBER; DR. JAMES E. MATHEWS, BOARD MEMBER, *Defendants.*

Complaint

The United States of America by its attorneys alleges:

1) This is an action to enforce the provisions of Title VI of the Civil Rights Act of 1964, 42 USC §§ 2000d *et seq.*, the regulations of the United States Department of Health, Education, and Welfare* (hereinafter "HEW") in implementation thereof, 45 C.F.R. Parts 80, 81, the Fourteenth Amendment to the United States Constitution, and the contractual assurances and undertakings made by Defendant Big Spring Independent School District (hereinafter "BSISD") in consideration of its continued receipt of federal financial assistance.

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* The United States Department of Education currently performs the duties with respect to school desegregation under Title VI that were performed in this case by HEW.

[Filed December 2, 1980]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. M-80-200-CA

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARSHALL (TEXAS) INDEPENDENT SCHOOL DISTRICT; TRUITT INGRAM, SUPERINTENDENT; THE BOARD OF TRUSTEES OF THE MARSHALL INDEPENDENT SCHOOL DISTRICT; E. E. MARSHALL, LOUIS A. WILLIAMS, MRS. O. H. CLARK, RICHARD BERRY, G. A. ROSBOROUGH, MEMBERS OF THE BOARD OF TRUSTEES, *Defendants*.

Complaint

The United States of America alleges that:

1. This is an action to enforce the provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000-d *et seq.*; the regulations of the United States Department of Health, Education and Welfare (HEW) (now the Department of Education) in implementation thereof, 45 C.F.R. Parts 80, 81; the Fourteenth Amendment to the United States Constitution; and the contractual assurances and undertakings made by Defendant Marshall Independent School District (MISD) in consideration for the continued receipt of federal financial assistance.

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[Filed September 23, 1980]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Civil Action No.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, *Defendant*.

Complaint

The United States, by its attorneys, alleges:

1. This is an action brought by the Attorney General on behalf of the United States to enforce the provisions of Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6; Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*; the regulations of the United States Department of Health, Education and Welfare (now the Department of Education and hereinafter "HEW" with reference to all times before the change) which implement Title VI, 45 C.F.R. Parts 80 and 81; the Fourteenth Amendment to the United States Constitution, and the contractual assurances made by defendant Board of Education of the City of Chicago (hereinafter "Board of Education") in consideration of its continuing receipt of federal financial assistance.

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[Filed May 23, 1978]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

Civil Action No. 78-22-C10-0C

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARION COUNTY SCHOOL DISTRICT; MARION COUNTY SCHOOL BOARD; DR. CAROLE A. PARRISH, Chairperson; JIM EBGLE, Vice Chairman; J. L. COLLUM, Member; SAM MANSFIELD, Member; CAROL FREIMUTH, Member; H. LEON ROGERS, Superintendent, Marion County School District,
Defendants.

Complaint (Injunctive Relief Sought)

The United States of America by its attorneys alleges:

1. This is an action to enforce the provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-d *et seq.*; the regulations of the United States Department of Health, Education and Welfare (hereinafter "H.E.W.") in implementation thereof, 45 C.F.R. Parts 80, 81; the Fourteenth Amendment to the United States Constitution; and the contractual assurances and undertakings made by Defendant Marion County School District in consideration of its continued receipt of federal financial assistance.

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